Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted]25

W. H. HIGHTOWER, B. A. WRIGHT, C. H. ANDREWS, ET AL.,
APPELLANTS,

vs.

THE AMERICAN NATIONAL BANK OF MACON, GEORGIA.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR APPELLEE.

CHARLES H. PARK,
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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

THE QUESTION

This record presents only one question:
Under the contract, as understood and construed by the parties, is the American National Bank a creditor of the Commercial National Bank and entitled as such to enforce the statutory liability of its shareholders?

Appellants, shareholders of the Commercial Bank, contend that the American Bank purchased the assets of the Commercial. Appellee contends, and the Circuit Court of Appeals holds, that the assets were pledged to secure the American for amounts advanced by it for the payment of the liabilities of the Commercial which it had assumed.

Two decisions of the Fifth Circuit Court of Appeals are under review. The first reversed the judgment of the District Court dismissing the bill. The second affirmed the final decree holding the shareholders liable to an assessment.

HISTORY OF THE SUIT

The suit was filed by the American National Bank of Macon, Appellee, hereinafter called the American, against the Commercial National Bank of Macon, hereinafter called the Commercial, and Appellants and others, the shareholders of the Commercial, under the Act of June 30, 1876, (§9807, Comp. Stats.), the Commercial having been placed in voluntary liquidation by a vote of its shareholders, as authorized by §§5220, 5221, R. S. (§9806. Comp. Stats).

The bill, in the nature of a creditor's bill, was filed by the American as a creditor on behalf of itself and all other creditors, in equity, in the Court of the United States having original jurisdiction for the district in which the Commercial was located, this being the remedy and the procedure provided by the Act of 1876, *supra.*

To the bill was attached the contract between the two banks signed August 11, 1914. (Tr. p. 20).

Motions to dismiss the bill were sustained by District Judge Evans, who held that the American purchased the business and assets of the Commercial and "that under the contract no relation of debtor and creditor was created or intended to be created." (Tr. p. 70).

Before the order dismissing the bill in accordance with this opinion was entered, the plaintiff amended the bill by attaching as exhibits thereto copies of the resolutions of the boards of directors of the two banks pursuant to which the contract had been executed, and copies of the resolutions of

the shareholders of the Commercial ratifying the action of the directors and placing the bank in voluntary liquidation; and by setting up the course of dealing between the two banks, and the contemporaneous construction placed upon the contract. (Tr. p. 53).

The District Judge adhered to his ruling in a supplemental opinion (Tr. p. 79); and a decree was entered dismissing the bill. (Tr. p. 83).

On appeal this decision was reversed (Tr. p. 1167), *in American National Bank v. Commercial National Bank,* 254 Fed. 249, the Court of Appeals, speaking through Walker, C. J., saying:

> "The contract contains expressions and provisions which do not seem to us to be reconcilable with the existence of an intention other than that the making by the American Bank of the agreed disbursements in taking care of the liabilities of the Commercial Bank was to have the effect of creating a debt or debts owing by the latter to the former."

Referring to the course of dealing outlined in the amended bill the Court holds:

> "The averments of the bill show that both parties to the contract from the commencement of performance under it, treated the payments made by the American Bank as having the effect of making it a creditor of the Commercial Bank."

An order reinstating the bill, in accordance with the Mandate from the Court of Appeals, having been entered (Tr. p. 85), the defendants made answer thereto. These answers virtually admit the statements of fact set up in the amended bill, but deny that under the facts admitted the American is a creditor of the Commercial, and as such en-

titled to enforce the statutory liability of the shareholders. (Tr. pp. 87-146).

The case was referred to the Master. After a full hearing, he filed an elaborate and well considered report, (Tr. p. 150), in which he found: that the allegations of the amended bill were fully sustained; that the American is a creditor of the Commercial and is entitled as such to enforce the statutory liability of its shareholders; that the amount of the Commercial's debt to the American is in excess of its capital stock of $300,000.00, and that therefore an assessment of 100% should be levied against the shareholders.

Ninety-one exceptions to the Master's report, occupying 214 pages of the printed record (Tr.pp. 296-510), were filed. None of these exceptions seriously question the correctness of the facts as found by the Master. They set up in every conceivable way that under the facts as established by the evidence, the American purchased the assets of the Commercial and therefore is not a creditor.

These exceptions were all overruled by the District Judge and a final decree entered confirming the Master's report and awarding judgment in favor of the American against the Commercial and its shareholders, in accordance with the findings of the Master. (Tr. p. 511).

This decree was brought under review by the second appeal and was affirmed, the Court of Appeals, speaking through Bryan, C. J., holding that:

> "The transactions are inconsistent throughout with the theory of a sale * * * We are of opinion that the decree of the court is well sustained by the evidence and it is therefore affirmed." (Tr. p. 1171).

Hightower v. American National Bank, 276 Fed. 371.

THE ERRORS ASSIGNED

Appellants assign error (Tr. p. 1178), on both decisions of the Circuit Court of Appeals. All the assignments, however, raise but the single question, that under the contract between the Banks, as understood and construed by the parties thereto, a consolidation or merger of the two banks was effected by the purchase of the assets of the Commercial by the American, and that, therefore, the American is not a creditor of the Commercial and is not entitled to enforce the statutory liability of its shareholders.

BRIEF OF THE ARGUMENT

PROVISIONS OF THE NATIONAL BANK ACT

The differences as to the construction of the contract between the two banks are due in large part to a failure to keep in mind the provisions of the National Bank Act, and a lack of appreciation of what can and cannot be done thereunder.

For convenience of reference the relevant sections of the Act and its amendments are cited.

The original National Bank Act of 1864 made the shareholders individually responsible equally and ratably

> "for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein in addition to the amount invested in such shares."
>
> §5151 *U. S. R. S.*

This section was superseded by the Federal Reserve Act (Act Dec. 23, 1913. 6, §23), but the shareholders' liability was again provided for in practically the same language.

§9689 *U. S. Comp. Stats.*

The original Act made no provision for enforcing the individual liability save in cases where a receiver was appointed by the Comptroller for a bank which had defaulted in the payment of its circulating notes.

§5234 *U. S. R. S.* (§9821 *U. S. Comp. Stats*).

It was held, however, that upon a creditor's bill, under the general equity powers, the Court could enforce such liability for the benefit of creditors.

King v. *Pomeroy*, 121 *Fed.* 287 (8 *C. C. A.*)

The original Act authorized the shareholders to place the bank in voluntary liquidation.

> "Any Association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

§5220 *U. S. R. S.* (§9806 *U. S. Comp. Stats.*).

This is the only method provided and it is exclusive.

The next section made provision for notice to be given to the Comptroller of the Currency and notice to creditors by publication in New York and in the city in which the bank is located.

§ 5221 *U. S. R. S.* (§ 9808 *U. S. Comp. Stats.*).

It was provided in the original Act that within six months after the vote to go into voluntary liquidation the bank should deposit with the Treasurer of the United States lawful money sufficient to redeem its outstanding circulation.

§5222 *U. S. R. S.* (§9809 *U. S. Comp. Stats.*)

The Act also provided for the cancellation of the circulating notes when money should have been deposited as re-

quired by the preceding section, and for the re-assignment of its bonds to the Association.

§5225 *U. S. R. S.* (§9811 *U. S. Comp. Stats.*).

By the Act of July 14, 1870, it was provided that:

> "An association which is in good faith winding up its business for the purpose of consolidating with another association shall not be required to deposit lawful money for its outstanding circulation, but its assets and liabilities shall be reported by the association with which it is in process of consolidation."

At the time the contract in the instant case was entered into, this was the only reference to *consolidation* found in the Act or any of its amendments. And it will be seen that this section did not authorize a "consolidation" as the term is used in the law.

"Consolidation," when applied to corporations, means "actual corporate union." Its "legal effect is to extinguish the constituent companies and create a new corporation with all the property, liabilities and stockholders of the old companies."

Rawle's Bouvier's Law Dictionary, p. 2202.

This section contemplates the continued existence of the liquidating association, and not a merger of the association with the other bank with which it proposes to unite. It contemplates that the association itself shall wind up its own affairs. It simply relieves it from depositing lawful money to cover its circulating notes where the circulation is assumed by another bank to whose credit the bonds deposited to secure the circulation are transferred.

The correctness of this assumption, we think, is established by the amendment of 1918, the title of which

is "An Act to Provide for the Consolidation of National Banking Associations." This Act authorizes a consolidation in the legal sense, the constitutent associations being extinguished and a new association being created with all the property, liabilities and shareholders of the old associations.

The Act of June 30, 1876, authorized the appointment of a receiver for a bank by the Comptroller under a variety of circumstances not theretofore provided for, which receiver was authorized, when necessary, to enforce the personal liability of the shareholders.

The second section of this Act of June 30, 1876, provides that when any National Bank shall have gone into voluntary liquidation (under §5220), the individual liability of the shareholders may be enforced by any creditor by a bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors, against the shareholders in any court of the United States having original jurisdiction in equity in the district in which such bank may have been located.

§9807 *Comp. Stats.*

It is under this provision of the Act of 1876 that this bill is brought.

SHAREHOLDERS ARE LIABLE FOR AN OBLIGATION INCURRED TO PAY BANK'S INDEBTEDNESS.

Under § 5220 R. S. quoted *supra* a national bank can be placed in liquidation only by the two-thirds vote of its shareholders. And this must be had, under the regulations adopted by the Comptroller of the Currency, at a special meeting called for the purpose upon thirty day's notice. Until such meeting is held and the requisite vote is taken the bank cannot be liquidated either for consolidation with

another bank or otherwise. But a bank which is in need of funds to meet its pressing demands may arrange for the assumption and payment of its liabilities, and may secure the creditor advancing the money by a pledge of its assets, and the debt of this creditor is a "contract, debt or obligation" of the bank, for which the shareholders are liable. That has been settled by the decision of this Court in

Wyman v. Wallace, 201 *U. S.* 230, 50 *L. Ed.* 738.

Affirming

George v. Wallace, 135 Fed. 286(8 C. C. A.),

in which the question is discussed at length and the facts are fully set out.

In the instant case, as in the case cited, the contract was made in contemplation of liquidation and the effect of the contract, as stated by Mr. Justice Brewer, was to substitute one creditor for many, the substitution being one which the bank was authorized to make.

Appellants contend that "the all important conclusion which was reached by the Court, and which distinguishes the case from the one at bar, is shown in the following excerpt from the opinion of the Court, to-wit:

> "The borrowing of money by the American Bank did not necessarily put it into liquidation. It had a large amount of assets, and if the real had equalled the nominal vaue of these assets it would have been enabled after discharging its obligation to the Union Bank to continue business. But on examination (after the loan had been obtained), the stockholders felt that it was wiser to stop at once. But that decision did not at all impugn the wisdom or bona fides of the transaction by which the money was obtained to pay off the pressing demands of the American Bank."

The situation in which the Nebraska bank found itself was identical with that of the Commercial. It was embarrassed and needed money with which to meet its pressing demands. The nominal value of its assets exceeded its liabilities by a considerable sum but the real value was much less. The Commercial was also in need of ready money to meet pressing demands. Its nominal assets exceeded its liabilities by over $400,000.00. In order to secure the money needed to pay its depositors and other liabilities the boards of directors of both banks transferred every asset which it had. The Nebraska bank sold some of its best paper outright to the Union Bank; the rest it transferred to the Union's president as security for funds advanced by the Union. It did not retain in its own custody a single asset or a single dollar. The Commercial pledged all of its assets but retained the physical custody of them, and itself paid off its depositors and bills payable with funds supplied by the American. The Nebraska bank gave up its banking house and the Union Bank immediately took possession of it and conducted its own business therein. The American set apart for the use of the Commercial a portion of its own banking room, of which the Commercial took possession and in which it conducted its business. The shareholders of both banks met in some sixty days, ratified what their directors had done and voted to go into voluntary liquidation.

This Court held that the debt incurred by the Nebraska bank to secure the money with which to pay its pressing demands was a "contract, debt or engagement" for which its shareholders were liable. By the same token the debt which

the Commercial incurred to the American is also one for which its shareholders are liable.

Appellants quote from the opinion in

Richmond v. Irons, 121 *U. S.* 27; 30 *L.Ed.* 864,

to the effect that the contracts, debts or engagements for which shareholders are individually liable are such "as have been duly contracted in the ordinary course of business."

In this case after the bank had gone into voluntary liquidation by the vote of its shareholders as provided by § 5220 R. S., the president settled with various creditors by transferring to them in *absolute extinguishment* of their claims certain commercial paper belonging to the bank. In some instances this paper was endorsed or guaranteed by the Bank. With some of the creditors settlements were made by the individual note of the president, likewise endorsed or guaranteed by the bank. These creditors brought suit on this guaranty or indorsement of the bank and recovered judgments and undertook to prove these judgments in the receivership case. The Court held that such settlements as these extinguished the original indebtedness, and that the new contracts upon which suit was brought having been made after the bank had gone into liquidation were not such contracts as could be enforced against the shareholders.

In a comparatively recent case, the Circuit Court of Appeals for the Eighth Circuit held:

> "The transfer by a bank, not able to meet its obligations, of all its property and assets as security to another bank, which assumes its indebtedness, is not a voluntary general assignment of the business and affairs of the bank * * * and is not ultra vires * * * and that an indebtedness for money borrowed to pay

debts is contracted in the ordinary course of business and the stockholders are liable."

Harris v Briggs, 264 *Fed.* 726 (8 *C. C. A.*).

A clear statement of the right of directors to provide for the debts of the Bank in advance of liquidation is made by the Georgia Court of Appeals:

> "While a bank may not transfer its assets for the purpose of consolidating with another bank without the consent of two-thirds of the stock of each bank (Code § 2303), it is competent for the directors to arrange for the payment of its liabilities if the bank itself is unable to discharge the liabilities in due course, and for this purpose it may borrow money or arrange for such payment by another bank. (See Wyman v. Wallace, 201 U. S. 230.)"

Amos v. Continental Trust Co., 22 *Ga. App.* 348 (5).

The Court had under consideration the contract between the Continental Trust Co., and the Commercial & Savings Bank, closely allied to the American and the Commercial, respectively, made at the same time and in practically identical language with the contract in the instant case.

Before undertaking to discuss the facts of the instant case one other case should be distinguished.

Schofield v. State National Bank, 97 *Fed.* 282 (8 *C. C. A.*)

Appellants' chief reliance is on this case. When properly understood, it is not antagonistic to the position which we take in this brief, and does not support the contentions of appellants. The misconstruction of the case arises from a failure to keep in mind the facts and to interpret the language of the Court in the light of these facts. Briefly, the case was this: Negotiations were pending between the

State and the Union Banks for the assumption by the latter of the indebtedness of the former in consideration of the transfer of certain live assets sufficient to pay the debts assumed. It was not contemplated that all the assets should be transferred, but that the Union Bank should select enough of the cash and live assets to pay itself for amounts advanced. There was not a suggestion of accounting to the shareholders for any overplus of these assets, but there was to be, as appears from the negotiations and the resolutions of the two banks, an absolute transfer of certain described assets in payment of the debt incurred in the assumption of specified liabilities. This is clear from the letter of the President of the Union Bank, which was adopted in effect by the resolution of the State Bank. This proposed that "until we can be satisfied in the selection of paper to reimburse us for the assumption of your liabilities, you secure us by your entire assets." The resolution of the State Bank authorized the President and Cashier "to carry into effect the proposed assumption of the business on the general basis of paying its deposit and borrowed money liabilities and receiving therefor cash and exchange and good paper, etc., sufficient to meet the same." No contract appears to have been drawn at the time, but more than a month afterwards an agreement which was evidenced by resolutions by the directors of both banks "was made in the performance of the contract of June, 1889." This contract, in addition to providing for the liabilities which the Union Bank had already assumed and in payment of which certain assets had been transferred, provided that the Union Bank should also assume certain rediscounts, amounting to $31,000.00, which had been omitted in the previous contract, and as security for this additional payment all the remaining assets were put in the hands of a trustee, who was to collect them and after paying certain expenses of liquidation repay the Union

Bank the amounts advanced by it, the resolution providing that the surplus of these assets, now for the first time pledged, should be returned to the State Bank. No such reservation of the surplus had been made in the original agreement. These resolutions also contained the distinct provision that the Union Bank "would not make or assert any claim or liability against or upon the part of said State National Bank or its stockholders beyond the said assigned assets."

It will readily be seen that the first contract provided for an absolute transfer of particular assets in payment of amounts assumed, while the formal resolution carrying into effect this contract added the additional element of the transfer of all remaining assets, with a reservation of overplus and a distinct agreement that there should be no liability beyond the assets. Judge Sanborn, in discussing the contracts, says that he is strongly of the opinion that under the original contract it was not intended there should be a debt, and that this intention is rendered perfectly clear because the parties themselves in interpreting this very contract when they were agreeing upon the details limited the liability to the assets. After quoting the last resolution which expressly exempted both the bank and the shareholders from liability, the opinion concludes, "The express terms of the contracts between the banks forbid the implication that the State Bank agreed to pay to the Union Bank any part of the debts which the latter assumed." (p. 286).

The expressed intention of the contracting parties in the Schofield case was to exempt the bank and its shareholders from liability, while the expressed intention of the parties in the instant case was not to exempt the bank or the shareholders from liability.

The Schofield case was also relied on in the Court be-

low, as holding that the assumption of the bank's debts is not sufficient to create a liability which can be asserted against the shareholders, because, as appellents insisted, the assumption was made after the suspension of the bank.

Again we think counsel have misunderstood the Schofield case. The argument in that case was that the contract between the two banks by which one undertook to assume the liabilities of the other was *ultra vires,* and it was sought to repudiate the contract and recover on the implied promise to repay the amounts advanced in payment of the liabilities. But the Court held that the agreement between the two banks was not *ultra vires,* "there was nothing in the contract beyond the powers of the Union National Bank" and, therefore, there was no foundation for a cause of action for money expended for another's use. It was also held that if the contract was not relied on, before suit could be predicated on an implied promise to repay amounts advanced, it must appear that the money had actually been advanced, whereas it distinctly appeared the Union Bank had not paid the liabilities and had become insolvent, and therefore could not pay them. It was sought to repudiate the contract because this in terms relieved the bank and its shareholders from liability, and to rely entirely on the implied promise to pay. The decision of the Court was that the contract was valid and could not be repudiated, and that before one can bring suit on the theory of money expended for another's use simply, the money must be actually so expended.

THE FACTS HAVE BEEN ESTABLISHED BY THE MASTER'S REPORT.

Perhaps all that need be said on behalf of the Appellee

is that the law of the case has been settled fully and finally by this Court in

Wallace v. Wyman, *supra.*

which was followed by the Circuit Court of Appeals in its opinion on the first appeal; that the facts have been found by the Master and his report has been approved by the trial court, and its decree has been affirmed on the facts as well as the law by the Circuit Court of Appeals, and therefore there is the strongest presumption in favor of the Master's report, which can be overcome only by clear and convincing evidence of a mistake or error by the Master.

Girard Life Ins. Co. v. Cooper, 162 *U. S.*, 529, 40, *L. Ed.*, 1062.

Camden v. Stuart, 144 *U. S.*, 104; 36 *L. Ed.*, 363.

Metsker v. Bonebrake, 108 *U. S.*, 66; 27 *L. Ed.*, 654,

2 *Foster's Fed. Prac, pp.* 1232-3.

No such error has been shown.

Indeed the report of the Master and his conclusions thereon are so well supported, both by authority and the evidence in the case, and the two opinions of the Circuit Court of Appeals are so clear, cogent and convincing that it seems quite superfluous to attempt to add anything thereto.

However, a brief resume of the more important evidence and a reference to a few of the authorities may not be amiss.

THE SURROUNDING CIRCUMSTANCES.

The circumstances surrounding the making of a contract may always be inquired into as an aid to its construction.

It appears from the minutes of the Commercial Bank that in June, 1914, (Tr. pp. 1054-1058), the bank was given a searching examination by the National Bank Examiner, as a result of which it was subjected to the severest criticism by the Comptroller. (Tr. p. 1059). The bank was practically taken out of the control of its officers and placed under the immediate direction of the Finance Committee. (Tr. pp. 736, 157). It was told in so many words that the acts of its officers were directly in violation of the National Bank Act and sufficient to subject them to criminal prosecution. (Tr. p. 1060).

The bank was put on probation with direction to reduce immediately several lines of credit largely in excess of the legal limit, and its directors were required to pledge themselves to such reduction and to a complete reformation in the conduct of its affairs.

As late as July 14th the Finance Committee reported that it had not been able to make any reduction in the three principal lines of credit, Parker, Jelks and Mallary, who together owed the bank more than its combined capital and surplus. The condition as disclosed by this report, over the signatures of Leon S. Dure and W. T. Anderson, was exceedingly grave. (Tr. p. 1064). The bank was manifestly cramped for funds; relief had to be obtained from some source. Rumors affecting the solvency of the bank became current. (Testimony of L. P. Hillyer, Tr. p. 880; E. Y. Mallary, Tr. p. 711; L. S. Dure, Tr. p. 737).

The situation is well described in the statement of W. T. Anderson made to the meeting of shareholders on Au-

gust 12, 1914 (Tr. p. 529-531). After referring to this examination of the bank made by Examiner Higgins, by whose request he and Mr. Dure took active charge of the bank, Mr. Anderson stated:

> "We found the bank had overloaned and we were unable to get in enough money on these loans to carry on business. Bad matters got worse. Exchanges were held up on Georgia banks and remittances not gotten out promptly. These requests for remittances came faster and faster, and finally withdrawals by the banks. The drain came stronger than we could take care of. Rumors got afloat.
>
> "We found the American National Bank kindly disposed and we got the officers to go down and talk to American National officials and arrange to have them taken over. We thought that if we could do anything to save a run and court costs it would save money for depositors and stockholders and protect the business interests of the city."

The admirable summary of the Master gives a vivid picture of the Commercial's situation and of the desperate straits in which it found itself. (Tr. pp. 160-165).

About the first of July the American had discounted for Lewis, Cashier of the Commercial, a note for $20,000.00, (Tr. p. 904). A little later, at the request of President Mallary, the American loaned to Director Jelks, first $25,000.00, and afterwards through the Continental Trust Co., $17,000.00, additional (Tr. pp 904-5), to enable him to reduce his line, the bank needing ready money. It also made some large direct loans to the bank, taking its bills receivable as collateral. (Tr. p. 701). On Thursday night before August 1st, Mallary, President, and Cobb, Vice-President, went to President Taylor's house and requested him to lend the bank from $50,000.00 to $100,000.00. (Tr. p.905).

The obtaining of this additional loan was the object of the visit. In view of the previous loans and of the rumors affecting the bank, Taylor suggested that the matter be taken up with the other banks composing the Clearing House. Mallary insisted that he didn't want the other banks to know about it, but wanted the American to handle the whole matter. Taylor was unwilling to make the loan until he had made some investigation of the condition of the Commercial. After it was agreed that this investigation would be made by the officers of the American, Mallary then suggested that in the fall he would like to discuss with Taylor a consolidation of the two banks, as he wished to retire from the banking business. And this is the only conversation which Taylor recalls at which a proposed consolidation was mentioned.

After going further into the condition of the bank, it became evident a loan of $50,000.00 or $100,000.00 was altogether inadequate, and it was then that the plan of furnishing additional assistance was worked out. (Tr. pp. 905-906). Again the Master's findings are most illuminating. (Tr. pp. 165-168).

THE DIRECTORS' RESOLUTIONS OF AUGUST 1ST.

On Saturday, August 1st, the Boards of Directors of the two banks held meetings and passed resolutions. These resolutions, as was said by Judge Evans in his opinion on the motions to dismiss, are "the determining factors, for under them the transfer of the assets was effected."

After spending all night in examining the receivables of the Commercial and endeavoring to ascertain its immediate necessities, President Taylor called a meeting of the directors of the American and laid the matter before them. The Board were told by Mr. Taylor that in his opinion the as-

sets of the Commercial were not sufficient to pay its debts. The bank's counsel was consulted and advised that the shareholders would be liable for any deficit. (Tr. pp. 909-910). After consideration, the directors authorized the bank's officers to assist the Commercial if on further investigation they deemed it safe to do so.

The resolution adopted by the directors of the American (Tr. p. 61), containing the proposition which the resolution of the Commercial accepted, dealt only with the immediate or present transaction. It makes no reference to a prospective consolidation of the two banks or to the liquidation of the Commercial. Its purpose is to care for the then existing emergency. It provides that "this association assume the payment of the deposits," etc. of the Commercial and "agree to pay the same when presented,"

> "upon condition that said association transfer to this association, as cash or as collateral for its notes, cash * * * and other assets sufficient in amount and in value, in the estimation of the officers of this association, *to fully protect and secure this association for any and all amounts so assumed, or shall otherwise satisfactorily secure this association* for all amounts paid or assumed." (*Italics ours*).

The resolution further provided that the American would take over the business of the Commercial and would account to its shareholders for any overplus which might remain after paying the indebtedness of the Commercial and the expense of realizing on the assets transferred.

W. T. Anderson, of the Commercial's Finance Committee, waited outside to hear the decision of the American's directors. His fervent "Thank God," when told the American had decided to liquidate the bank, feelingly expressed

the relief experienced by the Commercial's official family. (Tr. p. 915).

Thereupon a meeting of the directors of the Commercial was called to consider the proposition contained in the resolution of the American.

The resolution adopted by the directors of the Commercial (Tr. p. 60) is really two resolutions. In the first it is recited that "in the opinion of the Board of Directors it is expedient for this association to go into voluntary liquidation," and the officers were directed "to proceed to call a meeting of stockholders to consider this question and the consolidation with the American National Bank by the sale of its assets to said bank."

This clearly has reference to something to be done in the future . The resolution recognizes that action by the shareholders is required before liquidation can be begun. The meeting was to be called in order that the shareholders might consider the liquidation which the directors deemed expedient, and might consider, also, a consolidation with the American by the sale of its assets to that bank. This indicates—in fact, demonstrates— that no sale was, or was to be made by the directors unless so authorized by the shareholders.

The second resolution was an acceptance of the American's proposition, and was intended to make provision for the deposits and other liabilities of the Commercial,*pending action by the shareholders.* The Commercial being without funds to meet expected withdrawals, the directors resolved "that the exigencies of the situation are such that in contemplation of the liquidation of this association" (to he had in the future), a temporary arrangement to care for liabilities must be made. The directors, therefore, author-

ized the officers of the bank to transfer to the American "as cash, or as collateral for its notes," all the assets of the association, and the resolution proceeds:

> "Which said assets are hereby *transferred, assigned and delivered* * * * *in order to fully protect and secure said bank for all moneys advanced or to be advanced* by said bank under the assumption and payment of its deposits, bills payable and other liabilities of this association." (*Italics ours*).

It was further provided that the American should take over the business of the Commercial and account to the shareholders for any overplus which might remain after paying the indebtedness of the Commercial in full and the expense of realizing on the assets transferred.

The language of this second resolution shows beyond peradventure that the assets were transferred as security only. The language is "to fully protect and secure." The money to be paid out by the American is spoken of as "advances" or "amounts advanced and to be advanced." At that time the American had actually loaned, on the security of the bank building, $25,000, and on collateral, $50,000. This was the "amount advanced." It was to make other "advances" sufficient to pay all liabilities.

An "advance" and a "loan" are synonymous terms.

> "To advance is to supply beforehand, to loan before the work is done or the goods made. This is the popular understanding of the language as well as the accurate definition."

Laflin & Rand Powder Co. v. Burkhardt, 97 *U. S.* 110, 24 L. Ed. 974.

> "The word 'payment' indicates a finality. The word 'advancement' indicates the return of the money advanced in some way."

Henderson v. Ries, 108 *Fed.* 709, (4 *C. C. A.*)

"In the common understanding, an advance or loan of money on stocks, bonds, bullion, bills of exchange, or promissory notes, is an advance or loan where these species of property are pledged as collaterals or are hypothecated to secure the return of the advance or the payment of the sum lent."

Selden v. Equitable Trust Co., 94 *U. S.* 419, 24 *L. Ed.* 249.

Quoting Bouvier's definition of advances, the Supreme Court of Georgia says:

"This gives the strict legal sense of advances, and according to this, advances are loans and nothing more."

Nolan's Executors v. Bolton, 25 *Ga.*, 352, 356.

The definition of "advance", according to Bouvier, is "to supply beforehand; to furnish something before an equivalent is received; to loan. Rogers v. Bank, 108 N. C., 574, 13 S. E. 245."

Rawle's Bouvier's Law Dictionary, p. 150.

This resolution transferred the assets to secure an "advance," the arrangement being made with the expectation that thereafter the shareholders would authorize the liquidation of the bank and would provide for a sale of the assets thereby pledged to the American, and by such sale effect a consolidation (in the popular sense) of the two institutions.

The only other business transacted by the directors of the Commercial at this meeting was to provide for calling a meeting of the shareholders to be held on August 12th, the minutes giving the form of the notice to be sent to the shareholders, in which it was stated:

"That the business proposed to be transacted at said meeting is the consolidation of this bank with the

American National Bank of Macon by the sale of its assets to said American National Bank and the assumption of its liabilities in taking over its business by said bank, including the liquidation of said bank under Sections 5220, 5223 of the Revised Statutes." (Tr. p. 523).

The shareholders were thus notified that it was *for them to decide,* at the meeting of which notice was given, whether or not a sale of the assets to the American should be authorized and whether or not the Commercial should be placed in liquidation.

The resolutions of both banks left the actual contract to be made to be determined by the officers, the American's resolution leaving it discretionary with the officers as to whether any contract should be entered into.

There is not a suggestion in either resolution that an immediate sale of assets was to be made. It is true the officers were authorized to transfer assets "as cash." The Commercial had on hand cash, checks and other cash items aggregating $30,668.78. (Tr. p. 160). It was not expected that these should be hypothecated as collateral, but rather that the American should give immediate credit for them. These were to be transferred "as cash," but it was contemplated that the other assets should be held simply as security—certainly until affirmative action by the shareholders of the Commercial should authorize its liquidation and the sale of these assets.

Remembering the situation in which the Commercial was then placed, and having in mind, also, the provisions of the National Bank Act with regard to the liquidation of a national bank, the purpose of the two resolutions is perfectly clear and entirely consistent, not only with themselves but with what was done pursuant to their authority.

THE CONTRACT OF AUGUST 11TH

On August 11th a formal written contract was signed by the officers of the two banks. (Exhibit "A" attached to original bill, Tr. p. 20). This contract, which purports to be "Articles of Agreement for the Liquidation of the Commercial National Bank by the American National Bank," recites the resolutions of the boards of directors at the meetings held on August 1st. It hay be significant that all reference to a transfer of the assets "as cash" is omitted in the recital of both resolutions. The officers of the two banks, having been given authority to carry out the purpose of the resolutions and having been given the option of transferring, either "as cash or as security," the contract recites the resolutions as authorizing a transfer "as security," for that was the method actually adopted, and leaves out any reference to a transfer thereof "as cash."

Like the resolutions of the Commercial's directors, the contract relates to two subjects matter:

First: The transfer of the Commercial's assets under the authority of the directors, already accomplished: and

Second: The proposed liquidation of the Commercial and the handling of its affairs, if and when such liquidation should be authorized by its shareholders.

So far as the transfer of the assets is concerned, the contract is a memorial of a completed transaction. The assets were not transferred by the contract, but as appears from the contract itself, the transfer was accomplished by the resolutions, or under the authority of the resolutions by the officers. At the time the contract was signed they had already been pledged, and this fact is distinctly recognized in the contract.

Having recited the transfer, the contract in the first para-

graph confirms the transfer "at the close of business on August 1, 1914."

Paragraph two is the agreement on the part of the Commercial that, in contemplation of its liquidation to be accomplished under the appropriate sections of the Revised Statutes, a meeting would be called, and at such meeting resolutions would be adopted, liquidating the bank and consolidating it with the American by the purchase of the assets of the Commercial, but without providing for the issuance of stock to its shareholders.

This has reference to something to be done in the future at the meeting to be called. It shows clearly that no consolidation had been had up to that time and it was recognized that the Commercial was not then in liquidation. It also shows that the Commercial retained an interest in its assets which had been pledged to the American, because it provides that, in the event the shareholders authorize it, these assets are to be sold to the American. If, as is contended by the Appellants, a sale had already been had, how could the Commercial contract that its shareholders would pass appropriate resolutions for the sale in order to effect a consolidation.

The third paragraph, also, provides for resolutions to be passed at this proposed meeting of shareholders, under which the American would be appointed liquidating agent, which liquidation should be conducted under the supervision of the Commercial's board of directors.

The fourth paragraph makes it clear that no consolidation in the legal sense was contemplated, for it provides that until the final liquidation and final settlement with its shareholders, the Commercial should maintain its corporate existence. It provides for directors and officers, who should

perform services with reference to that liquidation and such as might be necessary to effectuate the transfer of the legal title to its assets.

By the fifth paragraph the American assumes the liabilities of the Commercial, but it is to be noted that it carefully confines its promise to pay to the liabilities shown by an exhibit attached to the contract. Up to that time it had not assumed the circulating notes of the Commercial, but the contract provided that it would procure the passage of an appropriate resolution for that purpose *when the Commercial should be placed in liquidation.*

By the sixth paragraph the American agrees that it will accept the appointment of liquidation agent for the Commercial (which appointment of course could not be made until the shareholders of the Commercial had passed the necessary resolution placing it in liquidation), and that it would collect and reduce to cash all assets of the Commercial,

"*All of said assets to be held as security by said American National Bank for all advances made by it in the payment of the depositors and other liabilities* of said Commercial National Bank and the actual expenses incurred by said American National Bank in realizing on said assets, and that, after deducting from the proceeds of said assets the actual expenses incurred by said American National Bank in liquidating said association and acting as liquidating agent and in collecting said assets and realizing upon the same, *it will apply said proceeds*:

"First: *In repaying to itself all amounts advanced by it hereunder, with interest thereon at the rate of seven per cent. per annum.*

"Next: In discharging the liabilities of said Commer-

cial National Bank which shall not have been paid by advances made by said American National Bank.

"And that when all of said liabilities shall have been fully discharged, *it will account to said Commercial National Bank and from time to time pay over to said shareholders, pro rata, the surplus remaining in its hands from the proceeds of said assets,* said American National Bank to act as such liquidating agent without compensation for its own services." (*Italics ours*).

Here is a clear and distinct recognition by both contracting parties of the capacity in which the American held the Commercial's assets. The American agrees to act as the agent of the Commercial in liquidating these assets. It agrees to hold them as security for amounts which it has advanced. It agrees to apply the amounts realized from these assets to repaying itself the amounts which it has advanced, plus interest thereon, and to account for the overplus. Is it conceivable that it would have made any such agreement if, as is contended by Appellants, it purchased these assests under the resolutions of August 1st? Can we conceive of a purchaser agreeing to act as the seller's agent in realizing on the property purchased and undertaking to dispose of that property and use its proceeds to repay himself? If he bought what is there to repay? Does a purchaser collect interest on the purchase money? Does a seller pay interest? Does a purchaser account to a seller for an overplus in excess of the purchase price?

As was said by the Court of Appeals in its first opinion speaking through Walker, C. J.:

> "this plainly indicates that the parties intended that performance by the American Bank of the obligations it incurred was to have the effect of creating an interest-bearing debt owing to it, and that the trans-

ferred assets were received and held by it, not as property bought by it, but as a pledge or security for the payment of that debt." (Tr p. 1164).

And, speaking through Bryan, C. J., in its second opinion:

"The provision for repayment of advances with accrued interest to the American Bank is the most positive kind of evidence of a loan." (Tr. p. 1174).

The sixth paragraph of the contract further provides that in the event the liquidation of the Commercial should be interfered with or discontinued, then the American bank "shall and does hold all of the assets of said Commercial National Bank as security for the advances which may have been made by it up to the time such liquidation shall be discontinued."

Here again is a distinct recognition that the assets belong to the Commercial, and that the only interest which the American has in them is to secure itself for loans or advances which it has made. The language is wholly inconsistent with the theory of Appellants that the American was the purchaser of the assets. Its attitude would have been little short of ridiculous if it had bought and was then the owner of the Commercial's assets.

"The contention by appellants (strongly urged in the Circuit Court of Appeals and still insisted on here) that the assets of the Commercial Bank were only intended to be pledged in the event the shareholders failed to ratify the resolutions and contract adopted and entered into by the directors on behalf of the two banks, or in the event the transaction should be attacked by suits, is not a reasonable or satisfactory one, in view of the general character of the provision which contains no such limitation,"

says Judge Bryan, (Tr. p. 1175).

The sixth paragraph concludes with this significant provision:

> "And it being further distinctly agreed and understood that neither the resolutions of said Boards of Directors of said associations, nor this contract, shall *relieve the shareholders of the Commercial National Bank from their legal liability as shareholders to respond, in the event it may be necessary to have recourse upon such shareholder's liability for any deficit* which may remain after exhausting the other assets of said association in the payment of its liabilities." (*Italics ours*).

It should be remembered that at the time the contract was signed the American had already, under the resolution of August 1st, assumed the liabilities of the Commercial. It was then advancing money in enormous amounts to enable the Commercial to pay off its depositors.

In view of this assumption the American was to be the Commercial's only creditor. The contract was between the two banks. No one else was interested in it. It was not contemplated that the Commercial should have any other creditor. To have inserted this clause in a contract of bargain and sale would have been most unusual, altogether unnecessary, and wholly out of place. It would have been entirely meaningless. But, as we have already shown, the American took the assets in pledge as security for its advances. It was therefore perfectly consistent that it should desire and should insist that in the event the assets were not sufficient to reimburse it, the liability of the shareholders should be preserved as an additional security for the large indebtedness which it had incurred.

This was an asset worth, nominally at least, $300,000.00. It was of greater value than any single asset the Com-

mercial had. The American had assumed liabilities of more than a million dollars. When the formal contract between the two banks was prepared, this paragraph was deliberately inserted, showing beyond peradventure that the contracting parties had this valuable asset in mind and that the American intended to resort to it if necessary.

We must perforce agree with Judge Walker that:

> "It hardly is conceivable that this provision would have been inserted in the absence of an intention that the making by the American Bank of the disbursements it obligated itself to make would result in creating a liability of the Commercial Bank for which the latter's shareholders would be individually responsible." (Tr p. 1169.)

The contract construed as we contend is consistent throughout. It is not consistent on any other possible theory.

THE SHAREHOLDERS MEETING OF AUGUST 12TH.

Pursuant to the call of the board of directors, the shareholders of the Commercial met on August 12th. At this meeting, at which 2,616 shares out of 3,000 were represented, a resolution was adopted ratifying the action of the board of directors as contained in the resolution passed on August 1st. This resolution, it will be remembered, in terms transferred the assets as security for advances made and to be made. (Tr. p. 528).

A resolution was also passed ratifying in full the contract between the two banks dated August 11th. (Tr. p. 528). This was not a mere formal or perfunctory act. The contract, as shown by the minutes, was read in full by Mr. Lane, the Counsel of the bank, and that paragraph with reference to the shareholders' liability was objected to

by more than one shareholder. (See testimony of Mallary, Tr. p. 710; Dure. Tr. p. 732; Benton, Tr. p. 807).

Mr. Lane explained that he had also objected to the insertion of the paragraph in the contract, but that the President of the American and its counsel had insisted that the paragraph be included. Mr. Lane gave it as his opinion that if the shareholders were liable under the law, the omission of the paragraph would not relieve them from liability, and that its insertion in the contract would not make them liable unless they were liable under the statute. (Master's Report, Tr. p. 224).

The contract was then ratified unanimously. (Tr. p. 532).

In light of this discussion, the shareholders knew that it was the purpose of the American to enforce the liability of the Commercial's shareholders "in the event it may be necessary to have recourse upon such shareholders' liability for any deficit which may remain after exhausting the other assets of said association in the payment of its liabilities." (Quoting from the contract).

They also knew that the American claimed to hold the assets only as security, and that under the contract it had obligated itself to act as liquidating agent in collecting the assets and had undertaken to apply the proceeds of such assets:

> "First: In repaying itself all amounts advanced by it hereunder, with interest thereon at the rate of seven per cent. per annum. * * * * *
>
> "And when all of said liabilities shall have been discharged, it will account to the shareholders of the Commercial Bank and from time to time pay over to said shareholders, pro rata, the surplus remaining in its hands."

Being advised that this was the construction placed upon the transaction by the American, and of the American's purpose to hold the shareholders liable for any deficit, after full discussion the shareholders unanimously ratified the contract.

The statement made at the meeting by W. T. Anderson is likewise illuminating. The minutes purport to give a literal quotation of a part of Mr. Anderson's remarks.

In this statement Mr. Anderson says:

> "The assets over the liabilities figured, according to my recollection, about $443,000·00, and that was the margin on which they took it, *backed by the additional liability of the stockholders.*" (Tr. p. 531). (*Italics ours.*)

Having ratified the transfer of the assets "as security," accomplished under the resolution of the directors, and having ratified the contract signed by the President and Cashier, after the matter had been fully explained and the construction placed upon it by the American had been given, the shareholders unanimously passed a resolution putting the bank in voluntary liquidation under § 5220, 5221, Revised Statutes, and appointed the American liquidating agent The resolution provided that the liquidation should be conducted "according to law and under the supervision of the Board of Directors;" that the liquidating agent should give bond, should make regular reports to the Comptroller of the Currency and annual reports to the shareholders. It provided for meetings of the shareholders and for a change in the liquidating agent if the shareholders should deem such change desirable. (Tr. p. 732-3).

This resolution is altogether inconsistent with the thought that a sale of the assets had previously been made.

If the assets had already been sold, why the necessity of a liquidating agent? Why require such agent to give bond or to make reports? If the assets belonged to the American would it be reasonable that it should undertake to administer them under the supervision of the directors of the Commercial?

The shareholders had been called together to consider the liquidation of the bank and its consolidation with the American by a sale of its assets to that bank. The shareholders passed resolutions for liquidation, but took no action whatever with regard to a sale of assets or for consolidating in any way with the American. It left the assets precisely where they had been before the meeting was held, pledged as security for advances made by the American. The only change made was the appointment of the American as its agent in liquidating these assets, with the written and signed agreement that the agent would apply the proceeds realized, "first, to repaying itself for its advances with interest thereon."

The only other business transacted by the shareholders at this meeting was the appointment of the "special stockholders' committee, representing the stockholders, whose duty it shall be to serve with the Board of Directors and who shall be consulted before any final action is taken by the Board of Directors on all matters relating to said liquidation by said American National Bank." (Tr. p. 531).

SHAREHOLDERS MEETING OF SEPTEMBER 30TH.

The Comptroller having ruled that the meeting of August 12th was illegal because thirty days notice thereof had not been given, the board of directors of the Commercial called another meeting of the shareholders, which convened

on September 30, 1914, there being represented at this meeting 2,684 shares out of 3,000. (Tr. p. 541).

Two months had elapsed since to meet the "exigences of the situation" the directors had transferred the assets to the American. In the meantime, the depositors of the Commercial had been in large part paid off. The American had made advances amounting to more than half million dollars in excess of amounts which it had received from the Commercial. The flurry caused by the Commercial's situation had largely subsided.

Mr. Lane, the counsel of the bank, at this meeting offered a formal written resolution (Tr. p. 542), which recited:

> "Whereas the Board of Directors of this association by resolution adopted on August 1, 1914, *transferred and assigned to the American National Bank all the assets of this association as security for the liabilities of this association, which were assumed* by the said American National Bank, said resolution being passed in contemplation of the voluntary liquidation of this association under the provisions of §§ 5220, 5221 of the United States Revised Statutes." (*Italics ours*).

The resolution then ratified the action of the directors, the contract of August 11th, and the resolution adopted by the shareholders at their meeting on August 12th placing the bank in voluntary liquidation. This resolution was adopted by vote of more than two-thirds of all the shareholders.

Can there be any doubt that the shareholders understood the capacity in which the American held the assets? How can these shareholders, in the face of this resolution,

contend that there was a sale of the assets accomplished by the resolution of the directors on August 1st? If they had thought it was a sale—if there was any basis whatever for this contention, would the accomplished lawyer, counsel for the association, a director and a considerable shareholder, have offered a resolution in which he recited that the assets had been transferred "as security?"

It appears from the minutes, and is made perfectly clear from the testimony of Mr. Benton (Tr. p. 810), that this was not a harmonious meeting. Severe criticisms of the management of the bank had been and were being indulged in. Jelks, who owed the bank approximately $100,000.00, had been forced into bankruptcy, and by this time it was apparent that his paper would be almost a total loss. Other assets, supposed to be good, had rapidly dwindled. From the testimony of Mr. Hillyer (Tr. p. 887), it appears that by this time it was well known that there would be a very material shrinkage of assets and the American would probably sustain a considerable loss.

Yet the counsel of the bank, who participated in the preparation of the resolution of the directors, and as a director voted for it, who had assisted in the preparation of the contract, offered to the shareholders a resolution reciting that the assets had been transferred "as security," and more than two-thirds of the shareholders voted for the adoption of the resolution.

The shareholders at this meeting adopted again the resolution for voluntary liquidation and for the appointment of the American as liquidating agent, the resolution being in the same form as that offered at the previous meeting, and reappointed the committee of five to assist in liqui-

dating the assets. (Tr. pp. 544, 546). This was the only business transacted.

Again, it is to be noted that no action was taken looking to a sale of the assets or to a consolidation with the American. In the minutes of neither meeting is there any reference to §5223 of the Revised Statutes, which alone referred to and possibly authorized a so-called consolidation. Again we remark that the assets were left precisely as they had been under the resolution of the directors, pledged as security for advances made by the American.

The American was now for the first time legally liquidating agent. Its contract as such agent authorized it to apply the proceeds of the assets, when reduced to cash, to repaying itself for amounts advanced with interest thereon.

HOW THE TRANSACTION WAS HANDLED.

On Monday morning August 3rd, the Commercial began business in a portion of the banking room of the American which had been set apart for its use. It brought to its new location all its officers and clerks. These officers were in charge of its books, papers, records, cash, and other assets. Cages were assigned to the paying, receiving, note and collection tellers. The bookkeepers were given desks, and the records of the bank continued to be kept by its own employees in the same way as had been done prior to the change of location. (Master's Report, Tr. pp. 176-178).

None of the assets of the Commercial were taken into the American's assets or entered on the American's books, nor were the accounts of the depositors transferred to the ledgers of the American. The Commercial dealt with its customers precisely as it had done prior to August 1st, though it encouraged its depositors to withdraw their bal-

ances and it discouraged them from making additional deposits. (Master's Report, Tr. pp. 178-9).

Comparatively few loans were made, and most of these grew out of the settlement of some past transaction. These amounted according to the Master to $93,434.71. (Tr. p. 181). But the Commercial paid off its depositors, (Tr. p. 179); the Commercial collected notes in its favor, (Tr. p. 182); the Commercial sold its tangible assets, (Tr. p. 205); the Commercial received deposits for a considerable period and amounting in the aggregate to a considerable sum. The Master finds more than $20,000.00 during the first week. (Tr. p. 180). The Commercial, for a time at least, cleared its own checks through the Clearing House. (Tr. p. 188). The Commercial dealt with its various correspondent banks and itself closed the accounts, making remittances where it owed money, and itself checking out balances where it had sums to its credit. (Tr. pp. 186, 189). The Commerical rented its own building and collected the rents. (Tr. p. 565). The Commercial paid its own expenses and the salaries of its own officers and employees. (Tr. p. 186).

In short, the Commercial continued in all respects as a separate, independent institution. The handling of its affairs was largely under the direction of E. N. Lewis, its Cashier, and of the members of the shareholders' committee, assisted by the officers of the American, its liquidating agent. (Tr. p. 191).

On July 31st the American had loaned the Commercial $25,000.00. This sum was charged to the Commercial on the bank ledger of the American, the amount being entered on the same book and in precisely the same way that the American kept the accounts of other banks to which it loaned money and from which it received deposits. (Tr. p.

194). This account was continued after August 3rd and was the only account which the American ever had with the Commercial.

Where the American cashed checks on the Commercial for its customers, these checks were presented to the Commercial and an officer of that bank gave the American a check to cover these amounts, which check in regular course was charged to the Commercial's account. When the Commercial made collections from any source it deposited the amounts collected with the American in the regular way, using the same deposit tickets that other customers used and being given credit for the deposits on the amount just as any other bank would have been credited with similar deposits. (Tr. pp. 189, 194-195).

The death of Mr. Lewis, the Cashier, and of Mr. Cobb, the active Vice-President, makes it impossible to prove how the arrangement relative to the keeping of the account was agreed on save by the officers of the American, but it appears that this method was put into effect by agreement at the time the Commercial began business in the banking house of the American, and this method begun at that time was continued until the liquidation of the Commercial was practically completed; the only account which the American had with the Commercial being the regular deposit and checking account, none of the assets of the Commercial, or its liabilities, appearing on the American's books. (Tr. pp. 178, 194-196, 655).

The method of keeping the books was explained in detail by Mr. Souder, who was at the time Assistant Cashier of the Commercial, Mr. DeBorde, one of its tellers, Mr. Scott, the Cashier of the American, and Mr. Creed Taylor, the expert accountant, who himself at different periods made

three separate audits of the Commercial's affairs. (Souder Tr. pp. 594-623; DeBorde, pp. 779-794: Scott, pp. 648-656; Taylor, p. 637).

The books of the Commercial, its cancelled checks, its expense vouchers, its drafts on corresponding banks, were all introduced in evidence to show how its accounts were kept and the books of the American showing the account and the amount of the overdraft were also introduced. The Master's Report sets out fully and in detail how the business was conducted and the account handled. (Tr. pp. 178-196).

Had the American been the purchaser of the Commercial's assets, these assets would have been entered on its books; the notes receivable, under "Loans and Discounts," on its general ledger; the real estate, under "Real Estate Account;" its stocks and bonds, under that head.

If the American had been a purchaser, it would have been entitled to the interest collected on the different bills receivable of the Commercial; and where less than the full amount of a note was collected, the loss would have been the loss of the American and not of the Commercial.

If the American had purchased the assets, it would have collected the rents on the Commercial's building and other real estate and it would have paid the expense of the upkeep of the property. (See testimony of L. P. Hillyer, Tr. pp. 184-186).

From the correspondence of the Commercial, taken from its files, it appears that these assets were always stated and spoken of as the property of the bank. There are numerous letters from the Cashier, calling on debtors to pay or call and arrange their notes held by the bank. Correspondent banks were written to with regard to collateral which they held. In several instances, other collateral was

substituted for notes falling due. In some instances, the Commercial renewed its own notes and secured the renewals. (Tr. pp. 190, 946, 947).

None of these things are consistent with a sale by the Commercial of its assets. In none of this correspondence is the transaction with the American spoken of as a sale or as a consolidation. The Cashier uniformly speaks of the Commercial as being in liquidation, and on account of this fact calls on its debtors to arrange their past due notes.

A great many of the debtors of the Commercial got into financial difficulties, and the Commercial itself, and in its own name, filed proofs in bankruptcy cases amounting in the aggregate to some $300,000.00. It filed a number of suits for the collection of paper due to it, in its own name. That is was always regarded as a separate entity is clearly shown by the fact that at one time or another nearly all of the members of its Board of Directors were engaged in litigation with it, generally as plaintiffs. Surely, if the bank had been consolidated with the American, or if it had sold its assets outright and was nothing but a "shell or legal phantom," these directors and others would not have undertaken to litigate with it. (Tr. p. 204).

Again, the Commercial at various times running through a period of some two years made conveyances of real estate, the consideration amounting to many thousands of dollars. Some of these sales were to the American, others to various other parties. It took conveyances, of real estate both absolute and as security. Some of this property it afterwards sold to the American at less than it paid for it. (Note the transaction with W. E. Small, by which the Commercial acquired property for $12,500.00 and sold it to the American for $10,000.00. Tr. p. 205). Surely if the

American purchased the Commercial's assets it would not thereafter have taken deeds from the Commercial for the property which it already owned, nor would it have been reasonable to expect that conveyances of property would have been made to the Commercial or that the Commercial would sell property to other persons.

That business was being conducted in this way and was expected to be so conducted, is clear from the testimony of Leon S. Dure and W. T. Anderson, members of the Finance Committee before the contract with the American and the active members of the liquidating or shareholders' Committee. (Tr. pp. 742, 748, 767, 768). It appears from their testimony that they themselves negotiated a great many of the settlements with debtors of the Commercial, and it is apparent that they were thoroughly familiar with everything which was done.

While not so active as they, John J. McKay was also a member of this committee and familiar with the method adopted. L. O. Benton and John F. Lewis, two veteran and experienced bankers, the other members of the Committee, were also familiar with this method. It appears that they purposely refused to consent to a good many things which were being done by the Committee.

Is it conceivable that this committee and the officers of the Commercial would have so acted with reference to the assets of the bank if there had been an absolute sale of these assets?

Anderson and Dure testified that within a few months after August 1st it was evident that there would be no surplus for shareholders, and yet they continued to act as members of the committee, and never once, so far os the evidence discloses, took the position that the assets belonged to the American. (Tr. pp. 88, 767, 840).

MINUTES OF THE SHAREHOLDERS COMMITTEE.

Fortunately we are not left to the recollection of members of the shareholders' committee as to the plan adopted for liquidating the assets of the Commercial, nor as to their interpretation of the contract between the two banks. The committee kept regular minutes of its meetings. These were identified and are admitted to be correct, though Messrs. Anderson, Dure and McKay are all of the opinion that the committee held a number of other meetings of which no minutes seem to have been kept. If their recollection is correct, this only serves to show that the committe was even more active and participated to an even greater extent in the liquidation than the minutes indicate.

At the first meeting of the committee, held immediately after its election on August 12th, when no one was present save the members of the committee, action was taken which is strongly corroborative of appellee's interpretation of the contract and entirely irreconcilable with appellants' contention. A few extracts may be of interest:

> "Mr. McKay moved that the $300,000.00 in bonds belonging to the bank be sold. Carried."
>
> "Mr. Benton moved that the Chairman request financial statements from the Mallary Mill Supply Co. Mallary Bros. & Co., Mallary & Taylor Iron Works, Mallary Machinery Co., Taylor Boiler Works, and also from F. L. Mallary, W. H. Roper, C. F. Smith, and the business of J. H. Virgin. Carried."
>
> "It was agreed that the Chairman take in charge the matter of renting the banking office and the offices in the bank building." (Tr. p. 564).

Appellants contend that the assets of the Commercial were sold to the American on August 1st, yet immediately

after ratifying the contract the shareholders' committee determined to sell $300,000.00 of bonds. The committee also, of its own motion, takes in charge the bank building and undertakes to rent it—an unusual liberty to take with another corporation's property.

Without undertaking to call attention to the minutes in detail, it may suffice to point out in a general way that this committee acted on a large number of matters and gave direction to them in a way which indicates beyond question that they regarded the claims and property as belonging to the Commercial. They granted extensions, called for security, directed sales, authorized compromises, placed a large amount of paper in the hands of attorneys for collection, required the transfer to the bank of various securities which had been held by its officers and of various stocks held by the bank as collateral. They authorized a number of most important contracts involving large values, notably the contracts with the Capitol Savings Bank, the Central Trust Company, the various Parker enterprises, and a number of others. (Minutes of Committee, Tr. pp. 564-592; Master's Report, Tr. p. 197, 293).

On November 2, 1915, they placed the bank building in the hands of real estate agents to secure bids, thus indicating that for more than a year they had continued to control the building and still regarded it as an asset of the bank. (Tr. p. 591). Still later they adopted a resolution requesting the American to offer the bank building for sale at public outcry at an upset price of $40,000.00. (Tr. p. 966, 968). The property having been withdrawn from sale because the upset price was not offered, the Board of Directors passed a resolution selling the building to the American for $40,000.00. (Tr. p. 205).

On April 6, 1915, the minutes contained this significant statement:

> "A full list of all the notes in the hands of attorneys for collection and those in the hands of the bank was submitted and carefully gone over. The *desirability of selling the American National Bank all of the unpaid notes at an agreed valuation was discussed at some length,* and it was decided that the committee from the Commercial National Bank would consider the matter of placing a value on the separate items with a view of recommending to the stockholders that this plan be adopted." (Tr. pp. 202, 581). (*Italics ours*).

And at the same meeting:

> "A motion was made and adopted that, in view of the Commercial National Bank *being the owner and holder* as collateral of large amounts of stocks and bonds of the Eagle River Mining Company, that this committee request their permission to have an audit and statement of the books and affairs of the said Eagle River Mining Company made." (Tr. p. 589). (*Italics ours*).

The sale of uncollected assets referred to in these minutes appears to have been a frequent matter of discussion during the years 1915 and 1916, as appears from the testimony of Mr. Dure (Tr. pp. 751-2) and of Mr. Anderson, (Tr. p. 767).

Is it conceivable that experienced and capable business men such as composed the shareholders' committee would have discussed the sale of assets which had already been sold eight months before? It will not do to say all that was meant was to place a valuation on these assets. This is flatly to contradict the minutes. Besides, it must be borne in mind that under the testimony of Anderson and of

Dure (Tr. pp. 767, 840), it was known by this time that there was no possibility of any surplus after paying the advances of the American, and therefore the shareholders could have no possible interest in these assets, and it would have made no sort of difference to them what valuation the American placed on the assets unless they were to be held liable for the deficit.

CORRESPONDENCE WITH AND REPORTS TO THE COMPTROLLER.

Both of these banks were National Banking Associations, required by law to make reports to the Comptroller of the Currency and subject to frequent examination by agents of his office. No bank could be liquidated save with his approval and under his general direction. Therefore what these banks said to the Comptroller must have been true; they could not afford to make any mistatement. The official communications to and from the Comptroller's office, made contemporaneously with the transaction, are of the greatest value, therefore, in determining what the contract was and how it was executed and construed by the parties.

Again, we call attention to the fact that a national bank can only be placed in voluntary liquidation by action of its shareholders, whether it is proposed to consolidate with another association or simply to retire from business.

The letters to and from the Comptroller's office refer to the proposed liquidation of the Commercial and its consolidation with the American. They also refer to the transfer of assets accomplished under the resolutions of the directors of the two banks in advance of such liquidation. Unless this is borne in mind, the correspondence may not always be perfectly clear.

A few excerpts from the correspondence demonstrate that the Commercial transferred its assets to the American as security for amounts advanced by it, and that there was no sale of assets.

On August 1st, the day the resolutions were passed, the American wrote the Comptroller:

> "The exigencies of the situation were such that the directors of the Commercial National Bank, *as security for such advances as this bank will be called upon to make* hereunder, have transferred to this bank all the assets of the Commercial National Bank. This was done in contemplation of formal, voluntary liquidation of the Commercial National Bank by consolidation with this bank, but without issuing stock in this bank to the stockholders of the Commercial National Bank." (Tr. p. 995) (*Italics ours*).

This paragraph correctly states the contract between the two associations.

That the Comptroller understood the situation is indicated by his letter of the 7th:

> "Your letter of August 5th is received in reference to the *contemplated consolidation* of the Commercial National Bank of Macon with your association, the plan involving the liquidation of the former." (Tr. p. 999). (*Italics ours*).

The Comptroller having written that no examination of the assets of the Commercial transferred to the American would be made, "but all assets improperly taken over should be eliminated as soon as possible," the American replied:

> "We do not quite understand the meaning of the clause quoted. You have been furnished with a copy of the contract between the two associations and of the resolution passed by the stockholders of the Com-

mercial National Bank, appointing this bank liquidating agent and *authorizing it to hold all assets transferred to secure the payment of amounts advanced* and assumed by this association." (Letter Aug. 4, 1914. Tr. p. 1003). (*Italics ours*).

On October 1, 1914, in response to a request from the Comptroller with regard to reporting the assets and liabilities of the Commercial, the American wrote a full explanation of how the transaction had been handled. The letter stated that on August 1st the directors of the Commercial by resolution transferred to the American, "as security for amounts advanced and to be advanced to pay the depositors and other creditors of that bank, all of its assets;" that subsequently a contract had been made pursuant to the resolution; that a meeting of the shareholders was held on August 12th, at which time they had ratified the action of the directors and had passed a resolution for voluntary liquidation and appointed the American liquidating agent. The letter then continues:

> "Pending this action by the stockholders, we have not thought it proper to transfer absolutely, and as a part of the assets of this association, the assets of the Commercial National, nor to assume in toto its liabilities. The business between the two institutions has therefore been handled in the following manner:"

Then follows a detailed explanation of how the account between the two banks was handled.

> "*This account appears now overdrawn something more than* $500,000.00, and in our last published statement is included under the amount due from other national banks. Our statement of September 12th shows all of the assets of the Commercial which have been taken over by this association and all liabilities which we have assumed, but does not include *the assets*

held as collateral for the overdrafts of the Commercial nor the bills payable and certificates of deposit of the Commercial which have not yet matured, nor any of the deposits which have not yet been transferred to this assocation." (Tr p. 1007; *Italics ours.*)

On August 14, 1915, the American reported:

"The amount now due by the Commercial National Bank of Macon is $418,229.53." (Tr. p. 1018).

On July 25, 1916, the American advised:

"The account of the Commercial stands this date on our books as $207,306.64." (Tr. p. 1023).

On March 17, 1917, the American again reported:

"The account with the Commercial National Bank now amounting to $288,809.00, is being adjusted as rapidly as practicable. *We hold collateral security* on which it is estimated that $190,000.00 will be collected. From the sockholders of that bank we hope to collect, by suit in equity under section (2) of the Act of June 30, 1876, at least $100,000.00" (*Italics ours*; Tr. p. 1027).

The correspondence between the Commercial Bank and the Comptroller's office likewise refers to the proposed liquidation of that bank and its proposed consolidation with the American. There is no reference anywhere in the correspondence to a sale having already taken place or a consolidation having already been effected, the letter of August 3rd being typical. In this the Commercial advised that a meeting of shareholders had been called "for the purpose of consolidating with the American National Bank of this city by liquidation and the transfer of the assets of this bank to the American National Bank."

This letter continues:

> "The exigencies of the situation are such that the directors felt justified, in contemplation of action to this end by the stockholders, to perfect arrangements today by which the assets of this bank have been actually transferred to the American National Bank, and that bank has assumed the liabilities of this bank and will pay, on presentation, the liabilities of this bank." (Tr. p. 1030).

While this letter does not state that the assets were transferred as security, it certainly does not state that they had been sold or that absolute title had passed to the American. But in the letter of August 19, 1914, in reply to the letter from the Comptroller advising that the meeting held on August 12th was illegal, the Commercial states definitely how the American holds the assets:

> "*The assets of the association are now held by the American National Bank as security for advances made and to be paid on the liabilities of this association.* We understand that this is proper, although the formal liquidation cannot begin until the resolution has been passed by a two-thirds vote of the stockholders at a meeting properly called and held." (Tr. p. 1037; *Italics ours*).

After the legal meeting had been held on September 30th, the Cashier of the Commercial writes the Comptroller:

> "I beg to advise that on September 30, 1914, a resolution was passed by the stockholders of the Commercial Natioal Bank of Macon, placing the association in voluntary liquidation under the provisions of Secs. 5220 and 5221 of the United States Revised Statutes, said resolution being adopted by more than a two-thirds vote, thirty day's notice of the meeting having been given." (Tr. p. 1043).

There is no suggestion anywhere in the correspondence after this meeting was held that the Commercial understood that its status was anything other than that of a bank in voluntary liquidation. It is clear that it abandoned its purpose to consolidate with the American by the sale of its assets. By this time its assets had shrunk to such an extent that it had nothing to offer to induce a consolidation. The correspondence refers to liquidating reports, to examination of the bank's condition, and other matters ordinarily incident to voluntary liquidation, but makes no further reference to consolidation.

On October 27, 1914, the Cashier submitted affidavits showing the publication of the notice of liquidation, required by §5221 R. S. which was acknowledged by the Comptroller in his letter of October 30, 1914. (Tr. p. 1051).

It is true that the American passed a formal resolution assuming the circulating notes of the Commercial, and that after the shareholders of the Commercial had voted to place it in liquidation on September 30th, the bonds of the Commercial securing its circulation, which under resolution of the liquidating committee already referred to had been sold to and paid for by the American, were transferred from the account of the Commercial to the Treasurer of the United States in trust for the American. (See letter of the Comptroller dated October 15, 1914. Tr. p. 1010).

In connection with the correspondence between the two banks and the Comptroller's office, should be considered the reports made to the Comptroller. Those of the American beginning with the report of September 12, 1914, and being made at regular intervals, four or five times a year as called for, always included as an asset the overdraft of the Commercial. In the first one or two reports the over-

draft was included in the amounts "Due by Other National Banks", while in the subsequent reports it was included under the head of "Loans and Discounts," and in the later reports it was under the head, " Due by Commercial National Bank". (See testimony of E. C. Scott, Cashier. Tr. p. 662; Master's Report, p. 196).

The reports made by the American as liquidating agent of the Commercial, beginning with December 31, 1914, the end of the first quarter, and continuing until the time the evidence was taken, always showed the overdraft of the Commercial as a liability of that bank, under the head "Due American National Bank". (Tr. p. 663,7).

It should be borne in mind that these were official reports made to the department of the gevernment having direct oversight and control over national banks. If this overdraft of the Commercial had not been an asset of the American, the officers of the American would not have dared list as a liability of the Commercial a claim which they knew was not a liability, for a false report or a false statement of condition would have subjected them to the severest penalties.

OTHER INSTANCES OF CONTEMPORANEOUS CONSTRUCTION SHOWN BY THE EVIDENCE.

In our opinion, the contract is perfectly clear and unambiguous. Its execution by the parties, as shown by the records of both banks, leaves nothing for construction. But if it be conceded that the contract is ambiguous, the construction placed upon it while it was in process of execution is overwhelmingly in favor of the theory of the appellee as to its meaning.

"When the language used by the parties to a con-

tract is ambiguous or of doubtful meaning, the practical interpretation given to it by the parties themselves when engaged in the performance of the agreement and before any controversy has arisen concerning it, is one of the best indications of its intent."
Schofield v. State National Bank, 97 *Fed.* 282-6 (8 *C. C. A.*).

This practical interpretation is shown by the plan adopted for keeping the account between the banks, by the minutes of the directors, and especially the minutes of the shareholders' committee, by the correspondence between Lewis, the Cashier, and the customers of the Commercial, its shareholders and its correspondent banks; to which reference has already been made.

But we may go still further. The evidence discloses that approximately half of the nominal assets of the bank consisted of claims against T. C. Parker and his various enterprises, E. N. Jelks and the Mallary corporations. These were the claims that got the bank in trouble, as shown by the report of the Fanance Committee on July 14, 1914. (Tr. p. 1064). These claims were, of course, included in the transfer of assets under the directors' resolution of August 1st.

On August 31, 1914, a contract was entered into between T. C. Parker and the Commercial and the American as its liquidating agent, and other parties, by which all of the Parker interests passed into the hands of a trustee. The contract shows that the Commercial, with other banks, held at the time of the contract large claims against the Parker companies. Under the terms of this contract, these interests were to be administered by a trustee under the direction of a committee representing the banks. As representing the Commercial and the American as its liquidating

agent, R. J. Taylor and Leon S. Dure were members of this committee. (Tr. pp. 1097-1107).

And on October 24, 1914, the Commercial entered into a contract with the Central Trust Company, T. C. Parker, and others, with a view to adjusting differences and conflicting claims to various securities held by the bank and claimed by the Central Trust Company. Under this contract the bank sold and transferred to the Trust Company notes "held and owned by said bank" of the Security Investment Company aggregating $32,450.00, together with bonds of that Company of the face value of $100,000.00; while the Trust Company sold and transferred to the bank notes aggregating $51,832.99, together with stocks and bonds of various corporations, including $150,000.00 of bonds of the Beechwood Farms. (Tr. pp. 1081-1097). Both these contracts, negotiated by the shareholders' committee, were formally approved by the Commercial's board of directors.

Parker having been forced into bankruptcy, on January 28, 1915 the Commercial proved two claims against his estate for $36,456.04 and $46,710.61, respectively. The bank also on December 19, 1914, proved two claims against the Parker Quarries Company, bankrupt: one for $7,800.00 and one for $5,976.13; and on March 26, 1915, it proved a claim against the Farish Brick Company, bankrupt (one of the Parker companies), for $19,008.99.

Surely it cannot be seriously contended that the Parker claims, amounting to $174,000.00, were sold outright to the American on August 1st.

E. N. Jelks was forced into bankruptcy within a few days after the transfer of August 1st. At the first meeting of creditors, held September 5, 1914, the Commercial

proved a claim in its own name and signed by its own officer amounting to $93,217.19. (Tr. p. 1081).

The minutes of the stockholders' committee are full of references to the efforts of that committee to protect the interest of the bank in the Mallary companies. At the first meeting of the committee Mr. Benton moved that the chairman request financial statements from all of these enterprises. (Tr. p. 564). On September 15, 1914, the committee had before it a typewritten statement prepared by F. L. Mallary, outlining the history and condition of his various concerns and their employees who were indebted to the bank. (Tr. p. 571). On October 17th the committee directed that F. L. Mallary be required to transfer to the bank the stock owned by him in his various corporations and give the committee authority to make necessary examinations of these enterprises, with a view to determining the value of the stock so that it might be accepted at an agreed valuation. This was again taken up at the meeting of October 21, 1914. (Tr. pp. 575, 576). On November 14, 1914, the Commercial filed an involuntary petition in bankruptcy against Mallary Mill Supply Company, one of the Mallary corporations, and on December 4th proved an unsecured claim against the company for $5,894.28. The books of the Commercial show that the stock of F. L. Mallary in Mallary & Taylor Iron Works was transferred to that bank and subsequently sold by it. (Tr. p. 1081).

The Commercial also proved claims against W. H. Roper, who had been connected with the Mallary enterprises, the claims being filed on Dec. 1, 1914, one for $11,075.00, and one for $4,738.64. (Tr. p. 1081).

In handling all of these large claims there are direct and unequivocal claims of ownership by the Commercial

which are inconsistent with the idea of an absolute sale of its assets previously made.

Nor is the evidence confined to formal or official acts. Note the letter of L. O. Benton to Leon S. Dure dated October 9, 1914, in which he refers to a proposed meeting of the shareholders' committee, the question being "turning over to the Central Trust Company certain assets belonging to the Commercial National Bank," and says that he would not care to be a party to a meeting where it is proposed "to turn over to the Central Trust Company any of the assets of the Commercial". (Tr. p. 1053).

Mr. Benton was the Chairman of the shareholders' meeting of August 12th, at which the contract between the banks was discussed, and that clause of the contract with reference to the shareholders' liability fully gone into.

Note also the letter of E. P. Mallary (a brother of President E. Y. Mallary), addressed to the shareholders' committee dated December 2, 1914, with reference to a sale of certain property belonging to S. C. Moore upon which the Commercial held a mortgage, Mr. Mallary desiring the affirmative approval of the committee before calling on the officers of the Commercial to make conveyance of the property. (Tr. p. 1051).

The letter of A. W. Lane the counsel of the bank and a member of its board of directors, dated October 23, 1915, is also illuminating. It appears from this letter that Mr. Lane had collected a claim in favor of the Commercial, that he deducted on account of the collection a fee of $500.00 and that he also deducted $1,500 "on account of fee for service rendered to the Commercial National Bank, and which said sum is accepted by me in full of my fee to date, so far as assets in the hands of the American National Bank

at the present time are concerned. This of course would not settle any claim that I may have for fees against the Commercial National Bank, nor is it intended to include the pending receivership case in the United States Court."

The balance Mr. Lane remits in a check payable to the order of the Commercial. (Tr. p. 969.)

Not only did the directors and shareholders recognize that the assets still remained the property of the Commercial, but it also appears that they undersood that the shareholders would be liable in the event the assets held by the American were insufficient to pay the amounts advanced.

John F. Lewis on August 18, 1914, after attending the shareholders' meeting held on August 11th, wrote to his nephew, E. N. Lewis, the Cashier of the Commercial, requesting the transfer of 150 shares of stock standing in his name, concluding his letter:

> "Kindly attend to this promptly and oblige, because there may be an assessment of the stockholders of the Commercial National Bank, and the Government might want to hold me on this stock." (Tr. p. 958).

Mr. Lewis' opinion, as time wore on, seemed to be strengthened, for in April, 1915, he wrote his nephew that "the prevaliing opinion was that the shareholders would be assessed." This we gather from E. N. Lewis' letter of April 9, 1915. (Tr. p. 961).

Mr. L. O. Benton, the President of any number of banks, also thoroughly understood the situation. We find him, within a day or two after the contract was made, undertaking to dispose of his stock in the Commercial; and a little later, having in the meantime served on the liquidating committee and realizing more fully the prospect of an

assessment, he sends in his stock certificates with the request that they be transferred, but he is plainly told that the transfer cannot be made, "as it is possible that an assessment may be made upon the stockholders in order to pay the indebtedness of the bank. No change of the present status, so far as it might affect the liability for this assessment, can be made."

(See letter of the Vice-President, Tr. p. 993.)

Not being able to escape liability by transferring the stock, Mr. Benton then proceeds to dissolve the Southern Securities & Financing Corporation, of which he was President and which held most of his Commercial stock. (See the proceedings to make these stockholders parties to this suit, set out in:

Benton et al. v. American National Bank 276 *Fed.* 368, (5 *C. C. A.*).

Birdsey, a shareholder, immediately after the meeting of shareholders on August 12th, filed a bill in the Superior Court of Bibb County, Georgia, for the appointment of a receiver to take charge of the assets of the Commercial, his reason being that it was necessary that the assets should be administered in this way in order to avoid an assessment of the shareholders. (See the report of this case: *Birdsey* v. *Commercial National Bank,* 143 *Ga.,* 627).

On November 3, 1914, Patterson and Payne, as shareholders, filed a bill in the United States District Court against the Commercial, its directors and the members of its shareholders' committee and also of another special committee of shareholders, praying for the appointment of a receiver. The bill alleged that the assets had been transferred to the American, and that the Commercial had guaranteed that enough would be realized out of the assets to pay

the liabilities assumed by the American. The principal ground upon which relief was prayed was that the assets should be preserved in order to protect the shareholders from the liability of an assessment.

The answer to this bill, filed on behalf of the bank, of the members of its board of directors, and of the shareholders named as parties, verified by its Vice-President and signed by its General Counsel, sets forth with remarkable clearness the transaction between the two banks and the then status of the Commercial and its assets. There is not in all this voluminous answer the slightest reference to a sale of the assets, nor to a consolidation between the two banks.

The answer, set out in large part in the transcript, is of the greatest interest. (Tr. p. 984). Its averments are solemn admissions in judicio that the assets of the bank were transferred to the American as liquidating agent and were held by it as such at the time the answer was filed. It is also admitted that by agreement the American advanced the money to pay off the Commercial's debts, and that the Commercial is in voluntary liquidation, the liquidation being conducted under the direction of the committee of shareholders and of the board of directors.

It is inconceivable that these admissions would have been made if, as a matter of fact, the assets had been sold to the American, or if the parties had understood that what they did amounted to a consolidation of the two banks.

The answer of the American in this case sets up plainly, and in so many words, that it held the assets as security for advances made by it, and that after exhausting the assets in

paying its debt intended to resort to the shareholders' liability for whatever balance might be due it.

All parties, therefore, concurred, thus early in the liquidation of the Commercial, as to its status and as to the capacity in which the American held its assets.

THE NEWSPAPER ADVERTISEMENTS.

Appellants refer again and again to the advertisements appearing in the newspapers the day after the resolutions of the directors of the two banks were passed.

An examination of these advertisements makes it apparent there had been some sort of merger of "assets and business", that while the purpose was to create the impression that a merger *de jure* of the banks themselves had not been effected. In both advertisements the depositors of the Commercial are requested to check on that bank until they transfer their accounts or make other arrangements. The advertisement of the Commercial calls attention to a meeting of the shareholders to be held in the future, and under the law there could be no consolidation or merger without the authority of the shareholders. That it was the purpose to merge the *"business"* of the two banks is unquestionably true, and this is all these advertisements say.

The Fourth Circuit Court of Appeals having under consideration a contract by which one bank purchased the assets and business of another and assumed its deposits and bills payable, held that this did not constitute a merger or consolidation of the two banks. An advertisement quite similar to those in the instant case was insisted on as showing a merger, but the Court said:

> "It is true that, in the advertisement of the change of business published by the First National Bank af-

ter its contract with the trust company, the change was referred to as a consolidation and merger. But that could not change the actual nature of the transaction, and it could not operate as an estoppel in favor of the Baltimore bank, because it did not act upon it."

Drover's & Mechanics' Nat. Bank v. First Nat. Bank 260 *Fed.*, 9 (4 *C. C. A.*).

As was said by Judge Bryan:

"The newspaper advertisements are not important. They were undoubtedly intended to bridge over a crisis and to allay any feeling of uneasiness on the part of depositors in the Continental Bank. Neither party was estopped by anything stated in them from asserting any contractual right or obligation it possessed." (Tr. 1175).

APPELLEE'S CASE, BOTH UNDER THE CONTRACT AND UNDER THE EVIDENCE, HAS BEEN SUSTAINED.

Appellants contend that the Court of Appeals held on the first appeal that the contract between the two banks was ambiguous and that the American's right to recover was altogether dependent upon the conduct of the parties and the construction placed by them upon the contract and the resolutions upon which it was based. The Circuit Court of Appeals does not agree with this construction of its first opinion. Says Judge Bryan:

"But the construction is untenable that the opinion on the former appeal held that the contract was ambiguous. Both the contract and the conduct alleged in pursuance of it were discussed and the opinion was based on both."

Proceeding on the theory that Appellee's right to recover depended solely on the construction of the contract by the parties, Appellants argue that the Fourth, Fifth

and Sixth paragraphs of the amendment to the bill were not proved. This argument is answered conclusively by the Circuit Court of Appeals.

The Fourth paragraph alleged that it was *agreed* that the Commercial's debt to the American should be carried as an overdraft. This "agreement" could not be proved on account of the death of the two active officers of the Commercial. But the Court of Appeals holds, as did the Master, that the averment "is susceptible of proof by the undisputed fact that it was represented by that method."

The Fifth paragraph alleged that for a short time, "some two weeks", the Commercial continued in active operation. This the Court holds "is sustained by the evidence."

The Sixth paragraph sets out a resolution of the Commercial's board of directors authorizing the sale of the bank building to the American for $40,000.00, the amount "to be credited on the indebtedness of the Commercial to the American." This resolution did not appear in the directors' minute book, and the directors, while recalling the fact of the meeting at which a resolution to sell the building to the American at that price was passed, did not remember the verbiage of the resolution. The building was in fact sold to the American and the $40,000.00 purchase price was in fact credited on the Commercial's overdraft. While this particular resolution was not proved, a dozen others equally as significant were proved and appear in the record.

These are the only averments about which even the Appellants contend there is any doubt as to the sufficiency of the proof. None of them, singly or together, are essential to Appellee's case—but all are substantially proved.

"The contract and various resolutions and the conduct of the parties throughout are all consistent with the theory of a loan * * *. The transactions are inconsistent throughout with the theory of a sale, * * *. The decree of the Court is well sustained by the evidence." Bryan, C. J., (Tr. 1174-6).

THE FALLACY OF APPELLANTS' ARGUMENT.

Appellants do not attempt to discuss as a whole either the contract or the evidence showing its construction by the parties. They content themselves with certain isolated sentences which seem to support the theory that there was a sale of its assets by the Commercial to the American or a consolidation of the two banks. The fallacy of this argument was pointed out by Judge Walker in the opinion of the Court of Appeals when the case was first before that Court:

"Provisions contained in the contract give some color to this construction [that there was a sale of assets or a consolidation] if they are considered by themselves without due regard to the remainder of the contract, the situation with which it dealt, and the conduct of the parties to the contract while performance under it was in progress evidencing what each of them understood was the effect of a compliance by the American Bank with the obligations imposed upon it by the contract." * * *

"The provisions referred to * * * * lose the significence sought to be attributed to them when they are considered in connection with other provisions contained in the contract and in the light of the situation existing when the contract was made and for some time afterwards, and of the construction of the contract by both parties to it as disclosed by what was done under it." (Tr. p. 1167).

IN CONCLUSION.

We respectfully submit that the contract is not ambiguous and that it has been construed correctly by the Circuit Court of Appeals; that the contemporaneous construction of the parties while they were operating under it demonstrates that the transaction was a loan of money and not a purchase of assets; that the averments of the bill as amended have been proved; that the report of the Master, approved by the District Judge, is fully sustained by the evidence; that both opinions of the Circuit Court of Appeals are sound and in accord with the law as announced by this Court; that the decree is the only one that could have been entered on the record as made, and that it should be affirmed.

Respectfully submitted,

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